SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 118

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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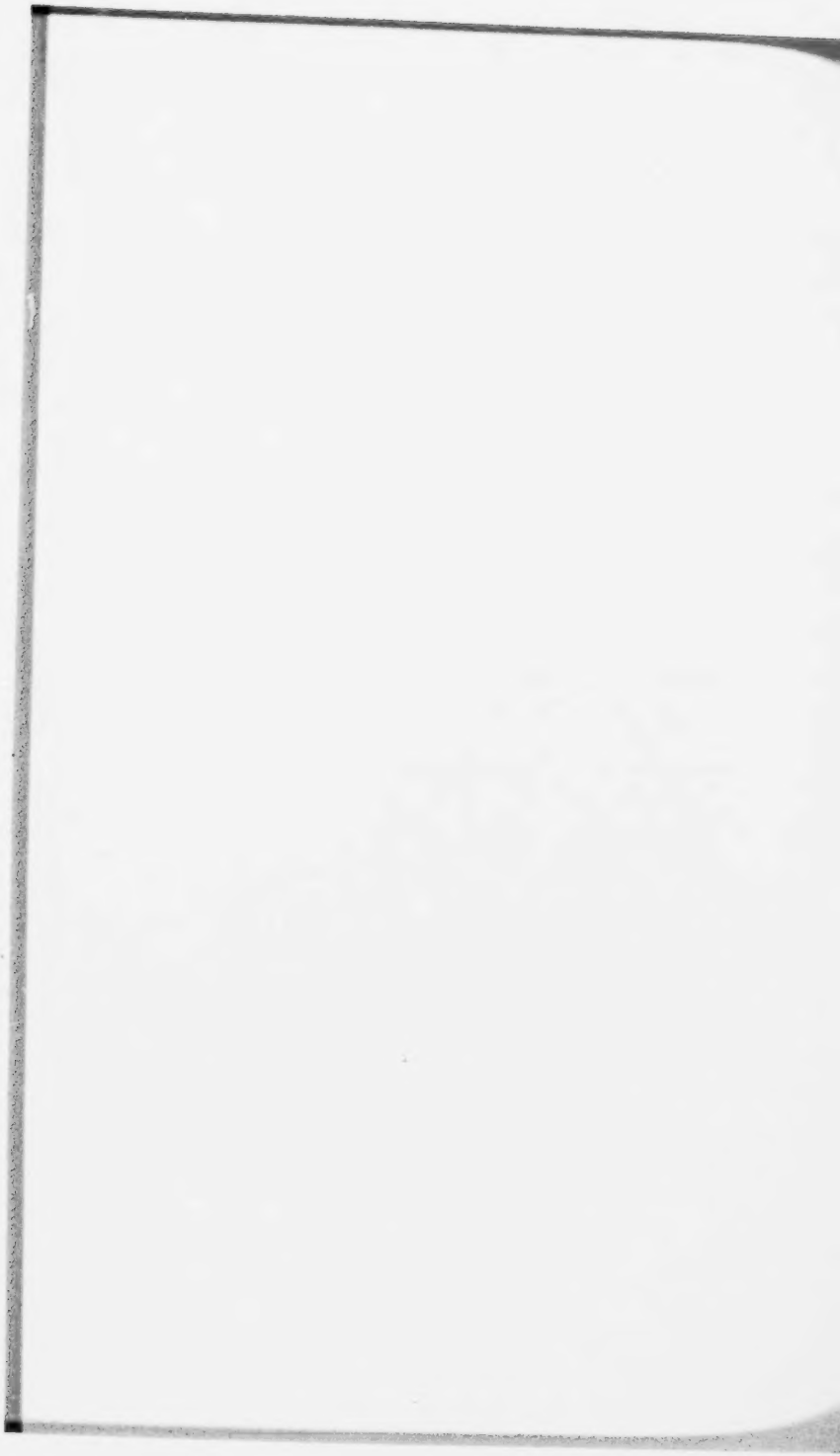

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MOTION TO AFFIRM

Appellee, National Broadcasting Company ("NBC"), pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed.

Statement

NBC is engaged in sound and television broadcasting and in sound and television network broadcasting. It is licensed by the Federal Communications Commission (the "Commission") to operate five standard broadcast stations, five frequency modulation broadcast stations and five television broadcast stations. In addition, it furnishes network programs to a considerable number of additional stations, commonly known as affiliates.

On August 18, 1949, the Commission adopted by 3 of its

7 members (of the other 4 members, 1 dissented and 3 did not participate) an Order (herein called the "Order") adopting rules with respect to the broadcast of certain types of programs. These rules provided that all applications in connection with the operation of a broadcast station (including license renewal applications) would be denied if the applicant proposed to follow or had followed a policy of allowing the broadcast of defined types of programs.

In its Report supporting the Order [1] the Commission took the position that the programs which it proposed to prohibit violated Section 1304 of the United States Criminal Code, Title 18 U.S.C., which makes the broadcasting of lottery information a misdemeanor. The Order itself incorporated in its paragraph (a) the language of Section 1304 as its principal definition of the prohibited programs; paragraph (b) of the Order, however, went on to set forth detailed criteria which the Commission intended to follow "in any event" in determining which programs were illegal. These detailed criteria made it apparent that the Commission was primarily attacking certain types of programs generally referred to as "telephone giveaway" programs which at various times and in various areas have achieved wide popularity. The language of the Order was ambiguous and broad enough to cover also a type of program commonly referred to as the "studio giveaway", but the Commission's staff took the position that this was not intended.

The distinguishing feature of the telephone giveaway program is the home participation of members of the broadcast audience in contests conducted with the assistance of the telephone. The contest participants are generally chosen in part by lot, there being no other practicable means of

[1] This report is annexed to the NBC amended complaint as Exhibit B; it can be found in Pike & Fischer, *Radio Regulation*, vol. 1, Pt. 3, page 91:231.

selection, and prizes are awarded for successful performances. The Commission has taken the position that all such programs are illegal lotteries. It bases its position upon the argument that a contestant by the very act of listening to the program is furnishing the "consideration" which has long been settled to be a necessary element of a lottery at the criminal law, and which in the classic lottery is the price of the lottery ticket.

The District Court upheld the right of the Commission to promulgate rules with respect to this subject matter and it held that programs of the giveaway type, but requiring contestants to contribute "any money or thing of value" were lotteries and did violate the statute.[2] It disagreed, however, with the Commission's position that programs imposing no such requirements are nevertheless lotteries and held that the specific paragraphs of the Order which would have the effect of defining all telephone giveway programs as lotteries are an incorrect interpretation of the law.

This is the only portion of the final judgment entered below from which an appeal has been taken. The United States itself has not appealed, presumably being satisfied with the District Court's decision as to this point; the Commission accordingly is prosecuting the present appeal alone.

ARGUMENT

Point I

The Decision of the District Court Is in Accord With the Overwhelming Weight of Authority

Section 1304 of the United States Criminal Code prohibits the broadcast of lottery information; other provisions pro-

[2] The majority and dissenting opinions of the District Court are reported *sub nom. American Broadcasting Co.* v. *United States*, 110 F. Supp. 374 (S.D.N.Y. 1953).

hibiting or penalizing lotteries have long been part of the law of the United States and of most States. A large body of case law has grown up as to the meaning of the word "lottery" and as to the elements which must be found in any scheme before the various anti-lottery statutes can be held to have been violated. This case law is unanimous on one point—that the three essential elements of a lottery are the elements of "prize", "chance", and "consideration". When any of these three elements is absent a contest is not to be considered a lottery. See, e.g., *Post Publishing Co.* v. *Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U.S. 675 (1916) (no consideration); *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914) (no chance).

Even the Commission in the Report which it issued in connection with the adoption of the Order paid lip service to this rule. The Commission said:

> "the proposed rules all deal with situations which contain in *some manner* all of the three elements of prize, chance and *some form* of consideration, which had been held by the courts to be the essential features of lotteries * * *." (Emphasis added) (Pike & Fischer, *Radio Regulation*, vol. 1, Pt. 3, p. 91:235-6)

The District Court considered however that in the specific paragraphs of its Order directed against the simple telephone giveaway the Commission had gone far beyond the true meaning of the element of consideration in this traditional definition. It was for this reason that it enjoined the enforcement of subparagraphs 2, 3 and 4 of paragraph (b) of the Order.

The evil which lottery statutes guard against is the evil of improvidence on the part of the public, especially persons of limited means, who might tend to squander their funds in a deluded hope of winning great prize. The element of consideration has therefore represented the precise element in

which lotteries have always seemed evil—the extracting from the contestant or would-be contestant of money or other things of genuine and considerable value. An excellent statement of this principle is made in Pickett, *Contests and the Lottery Laws*, 45 Harv.L.Rev. 1196, 1205 (1932):

> "Ordinarily, a man possessed of his wits, who is not trying to defraud his creditors, may give away his property as he pleases. Whether the gift is by chance or method is immaterial so long as he alone can lose by the transaction. It is only when other people are induced to give up consideration in the hope of obtaining greater returns that the law becomes concerned. The theory behind the lottery laws is that people should be protected from dissipating their money by gambling against odds which usually are not fully appreciated. The element of consideration is therefore of vital legal significance." (p. 1205)

By an accident of language "consideration" is also something traditionally requisite to making a promise enforceable and a contract valid. In our commercial society contract consideration is frequently found in mere technicalities.

In interpreting lottery statutes, however, to draw an analogy from technical contract consideration is to allow words to control sense to the detriment of genuine public policy. In general the courts have realized this and refused to be misled into adopting any definition of "consideration" for lottery purposes which would deprive the term of meaning and broaden the scope of the crime beyond the intent of the lawmakers.

One of the most recent cases on the point is discussed at some length in both the majority and the dissenting opinions in the District Court; it is *Garden City Chamber of Commerce* v. *Wagner*, 100 F. Supp. 769 (E.D.N.Y. 1951), *stay refused per curiam on opinion below*, 192 F.2d 240 (2d Cir. 1951). The principle involved, however, was perhaps more

clearly stated by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Wall,* 295 Mass. 70, 3 N.E.2d 28 (1936):

> "We agree with the defendant that the essence of a lottery is a chance for a prize for a price. [Citations] * * * One may give away his money by chance, and if the winner pays no price, there is no lottery. 'Price' in this connection means something of value and not the formal or technical consideration which would be sufficient to support a contract. [Citations]" (3 N.E.2d at 29-30).

The few contrary cases on which the Commission relies have been considered and rejected as authority in the best reasoned decisions. Thus, it is said in *State* v. *Big Chief Corp.,* 64 R.I. 448, 13 A.2d 236 (1940):

> "It has been held in a few cases that the requirement of consideration is satisfied by any conduct which would constitute consideration for an executory contract. See, for instance, Maughs v. Porter, 157 Va. 415, 161 S.E. 242. But this holding is against the very great weight of authority and we do not follow it in the instant case.
>
> "On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value." (p. 239)

When it is considered that we are dealing with statutes defining a crime, the majority rule seems the only one which can be justified. Other cases applying it include:

Post Publishing Co. v. *Murray,* 230 Fed. 773 (1st Cir., 1916), *cert. denied,* 241 U.S. 675 (1916);

State v. *Stern,* 201 Minn. 139, 275 N.W. 626 (1937);

State v. *Eames,* 87 N.H. 477, 183 Atl. 590 (1936);

People v. *Burns,* 304 N.Y. 380, 107 N.E. 2d 498 (1952) (See esp. statement of facts in 304 N.Y., not reprinted in 107 N.E. 2d);

People v. *Shafer*, 160 Misc. 174, 289 N.Y. Supp. 649 (Monroe Co. 1936, *aff'd mem.*, 273 N.Y. 475, 6 N.E. 2d 410 (1936).

The District Court with respect to this aspect of the case made the following cogent comments:

> "We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. • • •
>
> "It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute Griffith Amusement Co. v. Morgan, Tex. Civ. App., 98 S.W. 2d 844. It is the value to the participant of what he gives that must be weighed. People v. Cardas, 137 Cal. App. Supp. 788, 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. Commonwealth v. Wall, 295 Mass. 70, 3 N.E. 2d 28; State ex rel Stafford v. Fox Great Falls Theatre Corp., Mont., 132 P. 2d 689; People v. Burns, 304 N.Y. 380, 107 N.E. 2d 498. There are cases to the contrary, see footnotes in 54 C.J.S., Lotteries, § 2, on page 848, but this seems the more reasonable view." (110 F. Supp. at 386)

The District Court therefore properly rejected the Commission's argument, an argument which would in practice

prevent broadcasting from making any use of the well recognized "special appeal" to all audiences of programs involving actual audience participation in contests.

Point II

The Intent of Congress Was That Section 1304 Should Be Construed in Accordance With the Existing Law

Section 1304 of the Criminal Code in effect extended to broadcasting the prohibition against dissemination of lottery information which had long been in effect under Federal statutes relating to the mails, and which now is codified as Sections 1301-3 of the Criminal Code. The last revision of the language of the postal lottery laws of any significance occurred in 1909, and that revision was minor. Compare L. Mar. 4, 1909, c. 321, §§ 213, 237, 35 Stat. 1129, 1136 with L. Mar. 2, 1895, c. 191, 28 Stat. 963, and with Rev. Stat. §§ 3894, 3929, 4041. In 1934, when the Communications Act was passed, incorporating as Section 316 the prohibition which now constitutes Section 1304 of the Criminal Code, there was a very long history of interpretation of the postal lottery statutes. This history had resulted in a well established interpretation of the words "lottery, gift enterprise, or similar scheme" as being limited to schemes in which participants were required to furnish a *valuable* consideration. It was clear as a matter of law that technical contract consideration was inadequate to meet this requirement. See: *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914); *Post Publishing Co.* v. *Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U.S. 675 (1916); *Peck* v. *United States*, 61 F. 2d 973 (5th Cir. 1932).

Thus if there was anything with which Congress was dealing when in 1934 it passed the statute here involved that was well established, it was the legal interpretation of

this particular language. Under the circumstances when Congress deliberately selected the same language for use in a new statute dealing with the broadcasting of lottery information, it clearly showed that the schemes the broadcasting of which it desired to prohibit were the same schemes which had been prohibited for generations—and for 25 years described by the same language—when carried on through the mails.

Under the circumstances it is submitted that the District Court was clearly correct when it said:

> "The Federal lottery statute does not define a lottery. The term 'lottery' should be given its usual or popular meaning. Since it was part of the Federal Criminal Statute for so many years before the Federal Communications Act was adopted in 1934, the term 'lottery' should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code. Brown v. Duchesne, 19 How. 183, 60 U.S. 183, 15 L. Ed. 595; Burnet v. Harmel, 287 U.S. 103, 53 S. Ct. 74, 77 L. Ed. 199; Van Beeck v. Sabine Towing Co., 300 U.S. 342, 57 S. Ct. 452, 81 L. Ed. 685; N.L.R.B. v. John W. Campbell, Inc., 5 Cir., 1947, 159 F. 2d 184. (110 F. Supp. at 382)

The kind of administrative enlargement of the scope of long-established criminal laws which the Commission has attempted to accomplish here was only recently condemned by the Supreme Court in *United States* v. *Halseth*, 342 U.S. 277, 280, 281 (1952). There the Post Office Department, administering Section 1301 of the Criminal Code, which prohibits interstate transportation of lottery materials in terms substantially identical with those contained in Section 1304, had several times requested Congress to amend the statute to cover punchboards. No such amend-

ment was ever adopted, but an attempt was made to prosecute the transportation of punchboards under the existing section. The Supreme Court, pointing out that a penal statute should be strictly construed, refused to interpret the statute as covering punchboards. If an addition to the law was to be made, the Court observed, ". . . it is for Congress to make the addition". (Pa. 281) [3]

Conclusion and Prayer for Affirmance

As was pointed out by the District Court in its majority opinion:

> "This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission's membership. There are seven members of the Federal Communications Commission. The rules under attack were adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3) and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar 'give-away' programs, rendered by the Attorney General in 1940 although the Attorney General now appears in support of the Commission's new rules.
>
> "These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is

[3] The District Court in its opinion pointed out that a similar sequence of events had occurred in the present case. The Commission did not adopt the present Order until after it had failed over a period of nearly a decade to convince the Department of Justice and Congress that those agencies should act to prevent the broadcasting of "telephone giveaways". (110 F. Supp. 379-380, 388)

not authoritative. Interstate Commerce Comm. v. Service Trucking Co., 3 Cir., 186 F. 2d 400; Lincoln Electric Co. v. Commissioner of Int. Rev., 6 Cir., 190 F. 2d 326. We need not consider as applicable the admonition of Judge Frankfurter in National Broadcasting Co. v. United States, 319 U.S. 190 at page 218, 63 S. Ct. 997, 87 L. Ed. 1344, that the courts should hesitate to substitute their own views for those of the Commission in matters peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute, § 304, and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts." (110 F. Supp. 388-9)

The conclusion reached by the District Court is in accord with the overwhelming weight of authority on the techincal point here involved. Moreover it gives to the words of the statute under consideration the meaning which those same words in similar statutes had acquired by authoritative interpretation at the time Congress was choosing them.

It is respectfully submitted that no substantial question of fact or law is raised by this appeal, and that the final judgment of the District Court should therefore be affirmed on the appeal papers.

Dated: May 22, 1953.

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